No. 13870

United States Court of Appeals
For the Ninth Circuit

HAZEL ANNA WOLF, *Appellant,*

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization, *Respondent.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLANT

C. T. HATTEN,
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JURISDICTIONAL STATEMENT

A. Statutory provisions believed to sustain jurisdiction.

Jurisdiction of the District Court was invoked under the provisions of Title 28, U.S.C. §2241, 62 Stat. 964, as amended, particularly as follows:

> "(a) Writs of habeas corpus may be granted by * * * district courts * * * within their respective jurisdictions. * * *
>
> "(c) The writ shall not extend to a prisoner unless—he is in custody under or by color of authority of the United States. * * * "

Jurisdiction of the Court of Appeals for the Ninth Circuit is invoked under the provisions of Title 28,

U.S.C. §2253, 62 Stat. 967, as amended, particularly as follows:

> "In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had. * * * "

B. Statutes, the validity of which is involved.

8 U.S.C. 137 (c), (d), (e) and (g)—Act of October 1918 (40 Stat. 1012), as amended by the Act of June 5, 1920 (41 Stat. 1008), as further amended by the Act of June 28, 1940 (54 Stat. 673):

> "Any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * *
>
> "(c) Aliens who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or all forms of law * * * .
>
> "(e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in paragraph (d)
>
> * * *
>
> "(g) Any alien who was at the time of entering the United States or has been at any time there-

after, a member of any one of the classes of aliens enumerated in this section, shall, upon the warrant of the Attorney General, be taken into custody and deported * * * .

C. References to pleadings showing existence of Jurisdiction

Appellant's "Petition for Writ of Habeas Corpus * * * " (R. 1 & 2) states the statutory and factual basis of jurisdiction in that petitioner was in custody under color of authority of the United States, and Respondent conceded that the court had jurisdiction (R. 12).

CONCISE STATEMENT OF THE CASE

In view of the fact that appellant intends to urge errors of law, on admitted facts, it is sufficient to refer to the admitted pleadings as shown by respondent's return to show the questions involved, and the manner in which they are raised.

Appellant is a permanent resident of Seattle, King County Washington, and has resided continuously in the United States of America since December 26, 1922; that she was prior to entry a native of Canada and entered the United States for permanent residence; and has at all times thereafter intended and attempted to become a United States citizen (R. 3, 12).

That thereafter appellant was arrested by respondent and deportation hearings were held looking toward the deportation from the United States of appellant

under the provisions of the Act of October 16, 1918, as amended (8 U.S.C. §137) but prior to the amendment of said Act by the Internal Security Act of 1950 (8 U.S.C. §137) (R. 22).

That following a hearing the Assistant Commissioner, Adjudications Division, Department of Justice, Immigration and Naturalization Service, adopted the recommended order and decision of the Hearing Officer "that respondent was during 1937 and 1938 a member of the Communist Party," and concluded, as a matter of law, that under the Act of October 16, 1918, as amended, the respondent is subject to deportation (R. 26, 27).

Upon exhausting administrative remedies by appeal to the Board of Immigration Appeals, the appeal was dismissed and respondent directed appellant to produce herself for deportation from the United States, whereupon the within action was instituted in Federal District Court (R. 27).

The court thereupon ruled as a matter of law, and thereby presented the issues now raised on appeal, as follows:

Past membership in the Communist Party is, as a matter of law, a sufficient ground for deportation of an alien pursuant to the provisions of 8 U.S.C. 137 as it existed prior to amendment of said action by Section 22 of the Internal Security Act of 1950 (Public Law 831, 81st Congress, 2nd Session, 64 Stat. 1006) (R. 28).

The Act of October 16, 1918, as amended by the Act of June 28, 1940 (8 U.S.C. 137) providing for deportation of non-citizens who, after entry, became members of an organization which has thereafter been found by Congress to be an organization which advocates the overthrow of the government of the United States by force or violence is not unconstitutional as being in violation of the First Amendment, the due process clause of the Fifth amendment, and the *ex post facto* prohibitions of Article I, Section 9, Clause 3 of the Constitution of the United States (R. 29).

SPECIFICATION OF ERRORS

A. The district court erred in concluding that past membership in the Communist Party is, as a matter of law, a sufficient ground for deportation of a non-citizen pursuant to the provisions of 8 U.S.C.A. §137 as it existed prior to amendment of said section by section 22 of the Internal Security Act of 1950.

B. The court erred in concluding that "The Act of October 16, 1918, as amended by The Act of June 28, 1940 (8 U.S.C. §137) providing for deportation of aliens who, after entry, became members of an organization which advocates the overthrow of the Government of the United States by force or violence is not unconstitutional as being in violation of the First Amendment, the due process clause of the Fifth Amendment, and the *ex post facto* prohibitions of Article I, Section 9, Clause 3 of the Constitution of the United States.

SUMMARY OF ARGUMENT

A. Membership in the Communist party prior to the Internal Security Act of 1950 was not alone a ground for deportation.

Under the statute upon which the proceedings were based, the order of deportation having been based upon 8 U.S.C. §137 as it existed prior to the amendment of said section by Section 22 of the Internal Security Act of 1950, mere past membership in the Communist Party was not, as a matter of law, a sufficient ground for deportation, but the statute required proof that the non-citizen had been a member of an organization that advocated and taught the overthrow of the government of the United States by force and violence.

The court based this decision on the case of *Martinez v. Neelly,* 197 F.(2d) 462, affirmed by a four to four decision of the U. S. Supreme Court, 97 L.ed. (Advance p. 275).

It is submitted that the *Martinez* case was wrongly decided in that it based its decision on the Internal Security Act of 1950 without any opportunity for a challenge to the constitutionality of the Internal Security Act of 1950, and without argument thereon.

In thus deciding this case the court avoids, and thereby virtually concedes a failure to prove that appellant had at one time belonged to an organization which was proscribed under the statute under which the government proceeded by warrant against appellant, and based its decision upon a statute which appellant had no opportunity to attack. This failure to permit appellant to be heard denies due process.

The Internal Security Act of 1950 (Subversive Activities Control Act of 1950, Section 22 (Public Law 831, 81st Congress, 2nd Session, 64 Stat. 1006, 8 U.S.C. §137), is not involved in any way in these proceedings because the warrant of arrest and proceedings held thereunder, and from which review is sought, were not based on that Act.

B. Deportation cannot constitutionally be ordered for the alleged commission of an act which Congress had not proscribed at the time the act is alleged to have been committed, and cannot constitutionally be ordered of one who came to the United States as a permanent resident and settler in 1922 and has never violated the conditions then established for her continued residence therein.

Deportation for the alleged commission of an act which Congress did not impose as a condition to a continuation of "permanent" residence in the United States at the time the non-citizen established such "permanent" residence in 1922 is *either* a denial of substantive due process and completely without the constitutional power of Congress *or* it is in violation of the First Amendment, and the *ex post facto* prohibitions of Article I, Section 9, of the Constitution of the United States. See: "The Settler Within Our Gates," 26 New York University Law Review No. 2, 3, & 4, and "Deportation as a Denial of Substantive Due Process," by Stimson Bullitt, 28 Washington Law Review, No. 3, 205.

Appellant is being expelled for membership in the Communist Party "in 1938 and 1939." Membership,

as such, did not subject a non-citizen or alien to expulsion until the passage of the Internal Security Act of 1950, 64 Stat. 1008. It was not an expellable act at the time of appellant's alleged membership, and it certainly was not an expellable act at the time of appellant's arrival in the United States in 1922, and the non-membership in the Communist Party was never made a condition for her continued residence in the United States.

As will be shown by the argument hereafter, prior cases have *assumed* that the power to deport an alien is absolute, and that Congress could order the deportation of all aliens on *any* ground. The substantive due process issue here raised was not raised and considered in any of the basic arguments, save possibly in *Harisiades v. Shaughnessy,* 345 U.S. 580, and the case is distinguishable from the one at bar.

Likewise, the courts' prior rulings, giving priority over the assumed right or power to expel over the express guarantee of the Fifth Amendment, and the prohibition against *ex post facto* laws have always been demonstrably based upon *dicta* contained in the Chinese Exclusion case (*Chae Chan Ping v. United States,* 130 U.S. 581 (1889) and *Fong Yue Ting v. U. S.,* 149 U.S. 697 (1893) and subsequent cases prior to *Harisiades* (*supra*) also do not represent actual holdings.

Similarly, because the leading cases were not concerned with the power to deport settlers legally and permanently resident in the United States, and were actually concerned with the power "to exclude," little thought, if any, was given to the fact that the

court was giving priority to an assumed right to deport, which was in turn based upon the right to exclude, and this power was forming the basis for overriding the express guarantees of the Constitution.

ARGUMENT

I. The court cannot legally assume that membership in the Communist Party in 1938 and 1939 alone can support a deportation order based upon the Internal Security Act of 1950 when appellant is not given an opportunity to attack the constitutionality of that act.

Appellant was ordered deported by the Assistant Commissioner for Adjudications, Department of Justice, Immigration and Naturalization Service for alleged membership in 1938 and 1939 in an organization alleged to advocate the overthrow of the Government of the United States by force and violence (R. 18).

Appellant argued in the administrative hearing (Respondent's Exhibit A) and in the District Court that she was not a member of an organization advocating the overthrow of the government by force and violence.

Kessler v. Strecker, 307 U.S. 22, 30, 31, 83 L.ed. 1082, 1088 decided April 17, 1939 and *Dennis v. United States,* 341 U.S. 494, 95 L.ed. 1137 both support appellant's position that the Communist Party did not advocate the overthrow of the government in 1938 or 1939, since the *Dennis* case points out that the government contended a conspiracy to overthrow the government of the United States by certain named defendants did not commence until 1945.

Appellant also argued that only two of the government's witnesses, Paul Crouch and John Leech (Respondent's Exhibit A) submitted any testimony on this issue, and the witnesses who believed appellant to have been a member based upon their own alleged membership denied that the Communist Party so advocated.

To avoid ruling on this question the court ruled that mere membership in the Communist Party in 1938 or 1939 was, as a matter of law, ground for deportation, and based this decision on *Martinez v. Neelly,* 197 F.(2d) 462 (affirmed by a four to four decision of the Supreme Court on January 12, 1953 in 97 L.ed. .... (Advance p. 275).

Appellant submits that due process required that she be given the opportunity to attack at the outset the constitutionality of any act which is being used as a legal ground for ordering her deportation, and that the court by following the *Martinez* case (*supra*) denied her due process of law, and in fact conceded that the government had failed to prove deportability under the act as it existed during her hearing, namely, under 8 U.S.C. §137 wherein proof that the named organization was one which did in fact advocate the overthrow of the government by force and violence was required.

II. The power of expulsion or deportation of legally resident settlers cannot legally be equated with the exclusion power, and the United States Supreme Court has never held, in other than dicta, to the contrary.

The ultimate question in this case, as in *Harisiades v. Shaughnessy,* 342 U.S. 716, is whether the United States constitutionally may deport a legally resident alien because of alleged membership in the Communist Party which terminated before enactment of the Alien Registration Act of 1940 (54 Stat. 670, 8 U.S.C. §137).

There are significant factual differences. It is admitted that appellant came to the United States on December 26, 1922, as a permanent settler, and she has at all times herein mentioned intended and attempted to become a United States citizen (R. 3, 12).

Another basic difference pertains to the fact that *Harisiades* did not question a finding which was approved by the District Court, that the Communist Party during the time he was a member (which commenced in 1925), taught and advocated the overthrow of the Government of the United States by force and violence.

The *Harisiades* case (*supra*) in effect, held that the power of Congress to expel non-citizens was as broad as the power to exclude aliens in the first instance. In justification of this rule the court relied upon past decisions of the court (See Note 11) none of which are in point, and in discussing the matter, stated that Harisiades had perpetuated "a dual status as an American inhabitant but foreign citizen" and that "as an alien, he retains a claim upon the state of his citizen-

ship to diplomatic intervention on his behalf." The court continued to develop the distinction by stating that Harisiades "by withholding his allegiance from the United States * * * leaves outstanding a foreign call on his loyalties which international law not only permits our government to recognize but commands it to respect."

These statements do not square with the facts in this case. However, in addition we advert to the legal authority for the court's position that expulsion is based on authority or power inherent in every sovereign state, and that it is a weapon of "defense and reprisal."

Congressional power in immigration matters stems primarily from Article I, §8, Clause 2, of the Constitution which delegates to Congress the power "To regulate Commerce with foreign Nations;" and it is also said to be based upon national sovereignty.

Importation of goods is called commerce; importation of persons is a type of commerce called immigration. Constitutionally, however, the same power is involved. (cf. *United States v. Curtiss-Wright Export Corp.* (1936) 299 U.S. 304.) Thus in the *Chinese Exclusion Case* (1889) 130 U.S. 581, and *Nishimura Ekiu v. United States* (1892) 142 U.S. 651 it was decided that the power to exclude arises from the very nature of immigration, and in the *Ekiu* case (*supra*) relied upon the case of *Hilton v. Merritt* (1884) 110 U.S. 97, which involved the importation of goods, and thus illustrates the recognized constitutional interconnection between the importation of goods, and the immigration of persons.

When the power of the government to deport is considered there is no express power, and by the terms of the Constitution persons who are legally resident in the United States are entitled to the substantive freedoms guaranteed in the Bill of Rights (See *Bridges v. Wixon,* 326 U.S. 135, 160). We submit that this is the fact, despite *dicta* to the contrary which, in fact, would maintain that every non-citizen may constitutionally be deported for whatever reason it may choose, limited only by the due process requirement of a fair hearing.

However, appellant submits that Congress in passing the Immigration and Nationality Act of 1952, 66 Stat. 163 (1952) 8 U.S.C. §§1101 *et seq.* (Supp. 1953) commonly known as the McCarran-Walter Act, denied the latter position in so many words, as follows:

> "The power of Congress to control *immigration* stems from the sovereign authority of the United States as a nation and from the constitutional power of Congress to *regulate commerce* with foreign nations. Every sovereign nation has power, inherent in sovereignty and essential to self-preservation, to forbid entrance of foreigners within its dominions, or to *admit them* only in such cases and *upon such conditions as it may see fit to prescribe.* Congress may exclude aliens altogether or *prescribe terms and conditions upon which they may come into or remain* in this country."
>
> House Report No. 1513, March 13, 1952, p. 5. (Emphasis supplied)

The first case decided by the Supreme Court that involved deportation rather than entry, expulsion because of illegal entry, or proof of lawful entry, was

Zakonaite v. Wolf (1912) 226 U.S. 272 (For a discussion of all prior leading cases see Boudin, "The Settler Within Our Gates, 26 N.Y. U.L.Q., 266-290, 451-474, 634-662).

This case involved the Act of 1907, 34 Stat. 900, which provided that:

> " * * * any alien woman * * * who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years, after she shall have entered the United States, *shall be deemed* to be unlawfully within the United States and shall be deported. * * * "

This could be interpreted as a presumption that the alien had violated a condition precedent, the authority for which is unquestioned, rather than the violation of a condition imposed subsequent to entry.

In this regard the court stated on page 275:

> "It is entirely settled that the authority of Congress to prohibit aliens from coming within the United States, and to regulate their coming, includes authority to impose conditions upon the performance of which the continued liberty of the alien to reside within the bounds of this country may be made to depend. * * * "

In support of this quotation the Court cites seven cases, none of which involved the expulsion of a lawful permanent resident alien. The second case cited is *United States v. Zucker* (1896) 161 U.S. 475, which did not involve immigration, but upheld a subsequent forfeiture of goods that had been allowed entry because of fraudulent concealment of their value *at the time of entry.*

Thus it is clear that the power to expel is based properly upon the power to exclude, and is only understandable when it is related to that power, in that effective exercise of the power to exclude requires the auxiliary power to deport aliens who had recently and illegally entered.

The difference between deportation and exclusion was clearly stated by Justice Holmes in *Chin Yow v. United States* (1908) 208 U.S. 8, 12 relating to a man excluded as an alien, and who was denied a hearing to pass upon his claim of citizenship, as follows:

> "It would be difficult to say that he was not imprisoned, theoretically, as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried to China. The case would not be that of a person simply prevented from going in one direction that he desired and had a right to take. * * * "

Deportation of a settled resident is clearly far more than exclusion, and, although the whole includes all of its parts, it is still true that a part does not include the whole. Similarly, the power to exclude does not carry with it the much greater power, from the standpoint of the non-citizen, of deportation without any protection under the Constitution save procedural due process. (See Dissenting opinion of Mr. Justice Douglas in *Harisiades v. Shaughnessy, supra*).

Further, the true reason why the *ex post facto* provision was not held to apply to early deportation cases points up the fundamental difference between expulsion and exclusion. Thus the case of *Bugajewitz v.*

Adams (1913) 228 U.S. 585, involved the expulsion of a woman found in a house of prostitution, and was brought pursuant to the provisions of the Act of 1910, 36 Stat. 265, which eliminated a three year limitation under the 1907 Act. The deportation order was contested upon the constitutional ground that this was an *ex post facto* law, and upon the ground that the Act deprived the alien of her rights to jury trial, etc. Justice Holmes dealt with the *ex post facto* argument by saying:

> " * * * The prohibition of *ex post facto* laws * * * has no application * * * and with regard to the petition, it is not necessary to construe the statute as having any retrospective effect." (at p. 591).

This has meaning because, since the Act of 1903, 32 Stat. 1213, which was in effect in 1905 when the alien entered the United States, provided for the expulsion of prostitutes, and since the 1910 act struck out the three year statute of limitations and thereby rendered the alien subject to expulsion, it must necessarily have inferred that she could have been expelled or have been excluded at the threshhold under the then existing law for being a prostitute. Otherwise the statement that it is unnecessary to construe the statute as having any retrospective effect is meaningless, or patently false.

Further there was no pretense that after a five year stay, with no family, and her criminal activity while here she had become a rooted settler.

As has been pointed out above, and discussed fully in the Boudin article, 26 New York University Law Quarterly 266-290, 451-474, 634-662 (*supra*) and the

Bullitt article in 28 Washington Law Review 205, 217 (*supra*) the reason for the uniform *dicta* in the prior cases have been the "imaginary precedents" of *The Chinese Exclusion* and *Fong Yue Ting* cases (*supra*) and the *dicta* of later cases which were based upon the former, and the reasoning of the *Fong Yue Ting dicta* which if closely examined cannot be persuasive.

To return to the original basis of comparison between commerce and immigration, if unilateral conditions cannot be added to a contract governing property rights, then surely they cannot be imposed upon a status the loss of which deprives one of "all that makes life worth living."

To conclude, it is again submitted that the *implied* authority of deportation cannot be given priority over the express guarantees of the First, and Fifth Amendents of the United States Constitution, and Article I, Section 9 of the United States Constitution prohibiting *ex post facto* laws. Further, it is submitted that there is no rational basis for the arbitrary preference for the natural born among persons all of whom have acquired roots in the United States as a result of permanent residence, and therefore this class discrimination is a denial to deep-rooted aliens of the equal protection of our laws. Bullitt, Due Process in Deportation, 29 Washington Law Review 219.

As stated in the above cited article:

> " * * * the extension of the 1st Amendment to limit state power is a more drastic step than to read the Equal Protection clause into the Due Process clause of the 5th. By the latter, the Unit-

ed States would restrict its own powers and tend to harmonize its amendments. The 14th Amendment authorizes Congress to enact legislation to enforce the prohibition of a state's denial of equal protection. It should follow that it would be inhibited from doing itself what it is expressly authorized to prevent states from doing. The Supreme Court often tests the validity of federal legislation as to discrimination and classification under the Due Process Clause of the 5th Amendment by the same rules of equality that are employed to test the validity of state legislation under the Equal Protection clause of the 14th." (p. 219).

* * *

Also:

"It has been repeatedly held that despite the absence of an equal protection clause to check Congress, discriminatory Federal legislation may be so arbitrary and injurious as to be invalid as a violation of the Due Process clause." (p. 220).

Since appellant has not violated any condition that Congress can constitutionally impose upon her continued residence in the United States, the order of deportation should be set aside, and appellant should be released from the further custody of the Attorney General.

C. T. HATTEN,
Attorney for Appellant.

Dated, Seattle, Washington.
September 24, 1953.